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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CLAUDE SANDERS,

Defendant and Appellant.

D074251

(Super. Ct. No. SCD276526)

APPEAL from an order of the Superior Court of San Diego County, Polly Shamoon, Judge. Affirmed.

Ashley N. Johndro, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Craig H. Russell, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Claude Sanders pleaded guilty to resisting an executive officer in the performance of her duties by use of force or violence. (Pen. Code, § 69.) The trial court suspended execution of sentence and placed Sanders on formal probation for three years. Among the conditions of Sanders's probation, the court ordered Sanders to submit to warrantless searches of his computers, recordable media, social media, and media devices (electronic search condition).

Sanders appeals from the order granting probation. He contends the order's electronic search condition is invalid under state law because it bears no relationship to his crime and serves no rehabilitative purpose. He additionally contends the electronic search condition is invalid under federal constitutional law because it is overbroad.

There is currently a split of authority among the courts of appeal on the propriety of similar electronic search conditions. The California Supreme Court has granted review of several cases addressing this issue.¹ Pending further guidance from the

¹ (E.g., *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted Feb. 17, 2016, S230923; *In re Patrick F.* (2015) 242 Cal.App.4th 104, review granted Feb. 17, 2016, S231428; *In re Alejandro R.* (2015) 243 Cal.App.4th 556, review granted March 9, 2016, S232240; *In re Mark C.* (2016) 244 Cal.App.4th 520, review granted April 13, 2016, S232849; *In re A.S.* (2016) 245 Cal.App.4th 758, review granted May 25, 2016, S233932; *In re J.E.* (2016) 1 Cal.App.5th 795, review granted Oct. 12, 2016, S236628; *People v. Nachbar* (2016) 3 Cal.App.5th 1122, review granted Dec. 14, 2016, S238210; *In re Q.R.* (2017) 7 Cal.App.5th 1231, review granted Apr. 12, 2017, S240222; *People v. Bryant* (2017) 10 Cal.App.5th 396, review granted Jun. 28, 2017, S241937; *In re R.S.* (2017) 11 Cal.App.5th 239, review granted Jul. 26, 2017, S242387; *People v. Trujillo* (2017) 15 Cal.App.5th 574, review granted Nov. 29, 2017, S244650; *People v. Valdivia*

Supreme Court, we conclude the electronic search condition is valid under state law because it is reasonably related to preventing Sanders's future criminality. We further conclude Sanders forfeited his overbreadth claim by failing to object to the electronic search condition on this ground in the trial court. Accordingly, we affirm the order granting probation.

II

BACKGROUND

A

As the factual basis for his guilty plea, Sanders stated on his guilty plea form that he "used force or threats to resist or obstruct an executive officer lawfully performing her duties." He affirmed this factual basis during the plea colloquy.

According to the probation report, a code enforcement officer saw Sanders smoking on a trolley platform. When the officer and her partner contacted him, he refused to provide identification. When the officer tried to handcuff him, he resisted, pushed the officer away, and fled. As he fled, the officer grabbed his legs and he dragged her a short way until a sharp pain in her back caused her to release him. A police officer subsequently apprehended and arrested him.

(2018) 16 Cal.App.5th 1130, review granted Feb. 14, 2018, S245893; *People v. Acosta* (2018) 20 Cal.App.5th 225, review granted Apr. 25, 2018, S247656; *People v. Maldonado* (2018) 22 Cal.App.5th 138, review granted Jun. 20, 2018, S248800; *In re Juan R.* (2018) 22 Cal.App.5th 1083, review granted Jul. 25, 2018, S249256.)

At the time of the incident, Sanders was on formal probation for a domestic violence offense. Although he denied having a substance abuse problem, he had a history of drug use.

B

The sentencing hearing encompassed both the instant case and a companion probation revocation case, which included an order preventing Sanders from contacting the victim and was based in part on Sanders's continued drug use and failure to check in with probation. At the hearing, defense counsel objected to the electronic search condition on the ground there was no nexus between the condition and Sanders's offense.

The probation officer identified two nexuses for the condition. One, Sanders had a history of drug use. And two, the probation department needed to ensure Sanders complied with the restraining order issued in the companion probation revocation case.

However, defense counsel argued there was no evidence to support these nexuses. He pointed out the probation order underlying the probation revocation case did not have an electronic search condition and there were no reports of victim contact. He also pointed out drug users do not necessarily use social media or electronic devices to obtain drugs and there was no evidence Sanders used these means to obtain drugs.

The prosecutor concurred with both nexuses. She also pointed out Sanders was transient and did not have a home for the probation department to search. Consequently, searching Sanders's cell phone might be the only means the probation department had to ensure Sanders did not seriously reoffend.

The court opted to impose the electronic search condition, explaining: "In this case, not only does—is there evidence within this [probation] report that [Sanders] has used drugs and, in fact, drugs and alcohol have both been a problem for him, given his convictions and his bad behavior and bad judgment. In his probation [revocation] case, he violated probation on at least two separate occasions for using methamphetamine, on at least one occasion for using opioids, and on another for marijuana. He also didn't check in with probation when he was supposed to. He's had a no[-]contact order with the victim in that case; so probation needs all the tools it can use in order to monitor [Sanders], who has a [stayed sentence] of three years [in] prison hanging over his head should he violate, and so we need to give him the tools that we can to assure that he has the best chance of successfully completing probation and to monitor and be able to find out if he's not compliant with probation."

III

DISCUSSION

A

Sanders first contends the electronic search condition is invalid under state law because it is per se unreasonable. We review state law challenges to probation conditions for abuse of discretion. (*People v. Moran* (2016) 1 Cal.5th 398, 403 (*Moran*).)

" 'Generally, "[a] condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality....' [Citation.]" [Citation.] This test is conjunctive—all three

prongs must be satisfied before a reviewing court will invalidate a probation term.

[Citations.] As such, even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality.' " (*Moran, supra*, 1 Cal.5th at p. 403, citing *People v. Olguin* (2008) 45 Cal.4th 375, 379–380 (*Olguin*); *People v. Lent* (1975) 15 Cal.3d 481, 486, superseded by initiative on another point as recognized in *People v. Wheeler* (1992) 4 Cal.4th 284, 290–291.)

The People concede "[t]he private use of electronic devices is not criminal and is unrelated to [Sanders's] underlying offense of resisting an executive officer." However, the People contend the electronic search condition is nonetheless valid because it is reasonably related to preventing Sanders's future criminality. We agree.

The electronic search condition allows the probation department to effectively supervise Sanders's compliance with the other conditions of his probation, including the conditions precluding him from using alcohol and non-prescription controlled substances and from contacting the victim in the probation revocation case. "A condition of probation that enables a probation officer to supervise his or her charges effectively is ... 'reasonably related to future criminality.' [Citations.]" (*Olguin, supra*, 45 Cal.4th at pp. 380–381.) Accordingly, we conclude the electronic search condition is valid under state law.

B

Sanders next contends the electronic search condition is invalid under federal constitutional law because it is overbroad. However, the People assert Sanders has forfeited this contention by failing to object on this ground in the trial court. Again, we agree.

A probation condition that imposes limitations on a person's constitutional rights is overbroad unless the limitations are closely tailored to the purpose of the condition. (*Olguin, supra*, 45 Cal.4th at p. 384; *In re Sheena K.* (2007) 40 Cal.4th 879, 890 (*Sheena K.*)). A defendant forfeits an overbreadth challenge to a probation condition by failure to object unless the challenge is a pure question of law resolvable without referencing the sentencing record developed in the trial court. (See *Sheena K.*, at p. 889; see also *People v. Smith* (2017) 8 Cal.App.5th 977, 987.)

To determine whether the electronic search condition is sufficiently tailored to Sanders's rehabilitative needs would require a review of the sentencing record. (*In re I.V.* (2017) 11 Cal.App.5th 249, 261.) "An alleged constitutional defect that is 'correctable only by examining factual findings in the record or remanding to the trial court for further findings' is not a facial constitutional challenge, and traditional forfeiture principles apply." (*Ibid.*, quoting *Sheena K., supra*, 40 Cal. 4th at p. 887.)

IV
DISPOSITION

The order is affirmed.

McCONNELL, P. J.

WE CONCUR:

IRION, J.

DATO, J.